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Supreme Court of the United States

OCTOBER TERM, 1965

CHEMICAL NATURAL RESOURCES, INC., VENEZUELAN SULPHUR CORPORATION, C.A., HON. BYRON A. MILNER, President Judge, and HON. DAVID E. ULLMAN, Judge, of Court of Common Pleas No. 3 of Philadelphia County, *Petitioners,*

v.

REPUBLIC OF VENEZUELA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION

HOWARD C. WESTWOOD
WILLIAM A. DOBROVIR
GEORGE V. ALLEN, JR.
701 Union Trust Building
Washington, D. C. 20005

THOMAS F. MOUNT
1910 Packard Building
Philadelphia, Pa. 19102

Attorneys for Respondent

COVINGTON & BURLING
RAWLE & HENDERSON
Of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 1377

CHEMICAL NATURAL RESOURCES, INC., VENEZUELAN SULPHUR CORPORATION, C.A., HON. BYRON A. MILNER, President Judge, and HON. DAVID L. ULLMAN, Judge, of Court of Common Pleas No. 3 of Philadelphia County, *Petitioners,*

v.

REPUBLIC OF VENEZUELA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Was the Supreme Court of Pennsylvania correct in ordering an inferior Pennsylvania court to dismiss an action against a friendly foreign sovereign nation when the Executive Branch of the United States Government had filed a Suggestion of Immunity of the sovereign from suit and had requested such dismissal?

References herein are to the printed record (R.) before the Supreme Court of Pennsylvania; to the petition for writ of mandamus or prohibition and its exhibits (Pet. Mand.) filed with that court; and to the appendices to the Petition (App.)[1] here. The printed record and the petition for writ of mandamus or prohibition are in the certified transcript of record filed here by the Petitioners; Respondent has filed nine copies pursuant to Rule 21(4) of the Rules of this Court.

COUNTERSTATEMENT OF THE CASE

Petitioners are (1) a Venezuelan corporation, Venezuelan Sulphur Corporation, C.A. (Sulphur), (2) its stockholder, a Delaware corporation, Chemical Natural Resources, Inc. (Chemical), and (3 and 4) two Judges of the Court of Common Pleas of Philadelphia County, Pennsylvania. Respondent is the Republic of Venezuela.

On October 21, 1963, the Petitioner corporations filed a complaint in the Court of Common Pleas of Philadelphia County, Pennsylvania, naming Respondent as defendant. (R. 1a.) The Petitioner corporations invoked the court's process by attaching a vessel of a Venezuelan corporation of which the stock was owned by agencies of Respondent; shortly thereafter the vessel was released without prejudice. (R. 1a; App. D 34a.)

[1] Petitioners filed in printed form six appendices: the opinions of the two state courts below (App. C and D); a statute of the United States (App. B); the Department of State's so-called Tate letter (App. A); the writ of prohibition issued by the Supreme Court of Pennsylvania (App. E); and a letter from the Hon. Abram Chayes, Legal Adviser of the Department of State, to Mr. Benjamin Dowd, President of the Petitioner Chemical Natural Resources, Inc., which was not of record below. (App. F.)

The complaint alleged that Sulphur had acquired a mineral concession in the State of Sucre, Venezuela (R. 4a); that in exploiting its concession it had discovered geothermal steam (R. 5a); that it had agreed with a government agency of Respondent to erect a plant for the generation of electricity by such steam, the agency to buy electricity for two years (R. 5a-6a); that a decree was issued by the Respondent expropriating the steam without adequate compensation (R. 6a); that a further agreement was then negotiated whereby the plant would be built and operated for a term of years after which it would become the property of the Respondent (R. 7a); that the Respondent then delivered a confiscatory "ultimatum" without compensation (R. 7a-8a); and that thereby the plaintiffs had been damaged in the sum of $116,807,258.28 for which judgment against Respondent was prayed. (R. 8a-9a). The damages were categorized; almost entirely they consisted of alleged loss of prospective profits. (*Ibid.*; and see R. 31a.)

On November 16, 1963, the Respondent's Ambassador to the United States, upon the instruction of the Respondent, sent a note to the Secretary of State requesting that the United States Government transmit to the Court of Common Pleas a Suggestion of the Sovereign Immunity of the Respondent from this suit. (R. 18a.) The note was accompanied by a supporting memorandum setting forth in detail the history and nature of the matters involved. (R. 19a-40a.) It will be seen that there had been a long course of negotiation and controversy between Sulphur and certain governmental agencies of Respondent during much of the time between discovery of the steam in 1957 until late 1962, but that Sulphur had failed to

avail itself of remedies open to it in the Venezuelan courts under the laws and Constitution of Venezuela.

In due course, to avoid default, the Respondent, through its Ambassador, also filed in the Court of Common Pleas a special appearance asserting its sovereign immunity from suit. (R. 10a.)

During the consideration by the Secretary of State of the Ambassador's request for a Suggestion of Sovereign Immunity, the Petitioner corporations and the Ambassador were permitted to file full written presentations and to make an oral presentation, through counsel, to the Legal Adviser to the Secretary. (App. D 36a; Pet. Mand. 4.)

At length on January 29, 1964, upon instruction of the Attorney General of the United States at the request of the Secretary of State, the United States Attorney in Philadelphia filed a Suggestion of Sovereign Immunity in the Court of Common Pleas. (R. 52a-54a.) The Suggestion recited that it was based on "*a* policy determination reached by the Executive Branch of the Government of the United States in the implementation of its foreign policy and in the conduct of its international relations, which determination should be given effect" by the court. (R. 52a.) It advised the court that the Department of State "recognizes and allows the sovereign immunity of the Republic of Venezuela" in the suit, noted that the United States has an interest in "the subject matter and outcome" of the action, and prayed "that the determination of the United States as set forth in the annexed communication from the Department of State to the Attorney General be given effect, and that the action against the Republic of Venezuela be dismissed." (R. 52a-53a.)

After argument and reargument before the Court of Common Pleas, participated in by counsel for the United States, that court entered an order on December 18, 1964, refusing to dismiss the action, so requiring the Respondent to answer. (R. 55a; Pet. Mand. 6, 16.)

The Respondent did not answer; instead it appealed to the Supreme Court of Pennsylvania. It also filed in that court a petition for writ of mandamus or prohibition directed to the two judges of the Court of Common Pleas who had decided the case, naming those judges as respondents. The appeal and the petition raised the same substantive issue—the error of the Court of Common Pleas in refusing to dismiss the action pursuant to the Suggestion of Sovereign Immunity. The alternative courses of appeal and petition for an extraordinary writ were pursued because of uncertainty as to the proper procedure under Pennsylvania law.

The Petitioner corporations were parties to the appeal. They did not intervene as parties to the proceeding on the petition for extraordinary writ. In the latter the judges were represented by their own counsel both on brief and at oral argument.[2] The Supreme Court of Pennsylvania consolidated the appeal and the petition. (App. D 33a, 37a.)

On January 4, 1966, the Supreme Court of Pennsylvania announced a decision that the appeal should be quashed because the order appealed from was not final, but that a writ of prohibition should issue on the ground that the Court of Common Pleas should have dismissed the action in response to the Suggestion of

[2] In this Court all of the Petitioners are represented by the attorneys who appeared for the Petitioner corporations below.

Sovereign Immunity. (App. D 33a-57a.) Four of the seven Justices joined in the opinion of the court, one filing a short concurrence. (App. D 57a.) A fifth Justice concurred in the decision on the merits (App. D 63a) but dissented from the procedural disposition of the case on the ground that the issue was not ripe for decision. (App. D 58a-63a.) One Justice stated no opinion on the merits but dissented from the disposition of the matter by extraordinary writ, stating that appeal was proper. (App. D 87a.) Only one Justice dissented from the decision an the merits. (App. D 64a.)

On January 6, 1966, the Supreme Court of Pennsylvania issued a writ of prohibition directed to the Petitioner judges of the Court of Common Pleas commanding them to terminate proceedings in the action. (App. E 88a.)

REASONS FOR DENYING THE WRIT

1. This matter was most fully and deliberately considered by the Secretary of State. As the Petition points out (Pet., p. 5) the Petitioner corporations had taken up the matter with the Department of State long before the suit was begun. Unquestionably it was a matter on which the Department was fully advised by its Embassy in Venezuela, and then when, after suit was filed, the Respondent's Ambassador formally requested recognition and allowance of sovereign immunity, the Secretary of State gave the Petitioner corporations the privilege of making exhaustive written presentations and even of presenting the matter orally to his Legal Adviser. Care was taken that the counsel for the Petitioner corporations was fully informed of the representations made on behalf of the

Respondent. (App. F 89a.) And the Secretary of State had offered to the Petitioner corporations at least as early as October 21, 1963, the opportunity "to follow the customary procedure of presenting your position to the Advisory Committee on International Business Problems" of the Department of State. (*Ibid.*)

2. After this exhaustive examination by the Department of State, the Government of the United States "in the implementation of its foreign policy and in the conduct of its international relations" determined that a friendly foreign sovereign should not be required to submit itself to the jurisdiction of a court of common pleas in Pennsylvania in this matter. It is not difficult to understand why.

Essentially what was involved was an alleged grievance on the part of the Petitioner Sulphur to the effect that, in its exploitation of a sulphur concession on Respondent's public lands, it had discovered geothermal steam; that after a government decree under the Mining Law of Respondent reserving as part of the public domain all geothermal steam the rights to which had not already been perfected, the Respondent's Ministry of Mines allegedly had wrongfully held that Sulphur had not perfected its right to the steam under the pertinent requirement of the Mining Law (R. 28a-29a); and that Sulphur's then-proposed project to build an electricity generating plant, ultimately to be owned by the Respondent but to be operated in the meantime by Sulphur with sales of electricity to a governmental agency of the Respondent, allegedly was finally frustrated by an "ultimatum" prescribing rates for the sale of electricity that would have been "confiscatory." (R. 7a-8a, 23a-26a.)

The foreign policy implications of allowing an action based on this controversy to proceed in a court of common pleas in Pennsylvania are plain. Everything had happened in Venezuela. The only contact with the United States was the fortuitous circumstance that a corporation owned by the Respondent operated a vessel to Philadelphia in trade entirely unrelated to the Petitioner corporations or to Sulphur's concession or to any element of the alleged grievance. (R. 39a.) The courts in Venezuela were open to the Petitioner corporations to entertain that grievance. (R. 30a-31a.) Sulphur's concession, as provided by the Mining Law and the Constitution of Venezuela, required any controversy to be submitted to the courts of Venezuela. (*Ibid.*) As put by the Respondent's Ambassador to the Secretary of State, "The Venezuelan Government cannot accept the flouting of the provisions of the concession agreements and the Venezuelan Constitution by a Venezuelan corporation." (*Ibid.*)

3. Petitioners assert, however, that the Secretary of State's decision here was inconsistent with a State Department policy announced in 1952 in the so-called Tate letter, 26 Dep't. State Bull. 984 (1952). (App. A 1a-5a.) That policy was that the Department would thenceforth "follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity" (App. A 4a), and would decline to recognize immunity in a controversy arising from a foreign government's "engaging in commercial activities" (*ibid.*) while continuing to recognize immunity where the controversy arose out of the foreign government's "public acts." (*Id.* 2a.)

Nowhere beyond naked assertion in the Petition (p. 12) is the alleged departure from the Tate letter policy demonstrated; as Justice Jones stated in his concurring opinion (App. D 57a), there was nothing in the case to show that the Tate letter policy was not followed.

In fact the action of the Secretary of State was entirely in accord with that policy. The essence of the whole controversy here revolved around "public acts," in the Tate letter sense, of high agencies of Respondent's government. It was no commercial transaction like a collision with a government ship engaged in ordinary trade. It touched intimate concerns of the Respondent in its soverign capacity: the administration of its own Mining Law governing natural resources on its own public lands under its own Constitution, as affected by a franchise held by a Venezuelan corporation, and the determination of electricity rates to be charged in the State of Sucre.

4. Petitioners argue that, because the Secretary of State considered the policy of the Tate letter, he decided "legal issues," and this makes his action reviewable by the courts. (Pet., pp. 10, 17.) But the Tate letter did not purport to prescribe a rule of law. Rather it was, as it declared, nothing but a declaration of policy. (App. A. 4a.)[3] It did not even purport to set out all the policy considerations which go into the decision whether or not to recognize and allow sovereign immunity in a given case. As explained by the Solicitor General in his Memorandum

[3] Of course the Tate letter does not have the character of an administrative regulation subject to the procedural requirements of the Administrative Procedure Act which the Petition (pp. 13-14) ascribes to it. Section 4 of the Administrative Procedure Act expressly excludes therefrom matters involving foreign affairs.

to the Chief Justice opposing the application for stay of libellants Rich and Precha after the decision in *Rich* v. *Naviera Vacuba S.A.*, 295 F. 2d 24 (4th Cir. 1961), the Tate letter "is wholly and solely a guide to the State Department's own policy, not the declaration of a rule of law or even of an unalterable policy position and, in addition, it sets forth only some of the governing considerations and does not purport to be all-inclusive or exclusive." 1 *International Legal Materials—Current Documents* 288-89 (1962).[4]

The Petition also intimates that the Tate letter was a retreat by the Department of State from the rule of *Ex parte Peru,* 318 U.S. 578 (1943), recognizing the conclusive effect of the Suggestion of Immunity when issued by the Department. (Pet., pp. 14, 16, 17.) However, the Tate letter announced only a future policy of the Department not to recognize and allow immunity in cases arising out of foreign governments' "commercial activities." It did not announce abandonment of the practice of issuing Suggestions of Immunity, nor did it hint that such Suggestions, when issued, were no longer to be considered binding. And since publication of the Tate letter the Department has continued to issue Suggestions of Immunity intended to be binding on the courts; and the courts, following *Ex parte Peru,* have continued to accord such Suggestions conclusive effect. See, *e.g., Rich* v. *Naviera Vacuba S.A., supra; Knocklong Corp.* v. *Afganistan,* 6 Misc. 2d 700, 167 N.Y.S. 2d 285 (Nassau County Ct. 1957).

5. In no case that our research has disclosed, decided before or after the Tate letter was published, has a

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[4] The Chief Justice denied the application on September 11, 1961, with an endorsement citing *Ex parte* Peru, *supra,* and Mexico v. Hoffman, 324 U.S. 30 (1945). 1 International Legal Materials—Current Documents 276-77 (1962).

court refused to accept as binding a Suggestion such as that filed in this case, unequivocally recognizing and allowing the immunity of the foreign sovereign from suit as a defendant.[5] This is not like cases where

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[5] For authority to the contrary the Petition cites only The Katingo Hadjipatera, 119 F.2d 1022 (2d Cir. 1941) (per curiam), *cert. denied sub nom.* Diamantopoulos v. American Tobacco Co., 313 U.S. 593 (1941). In that case the Secretary of State requested only that the United States Attorney "present to the Court the enclosed certified copy of the note of the Greek Minister, with its enclosures, without argument or comment on his part, other than to state that the statements of the government of Greece . . . are brought to the attention of the Court as a matter of comity. . . ." Record, p. 22, Diamantopoulos v. American Tobacco Co., No. 1051, October Term 1940. Later, in response to a specific inquiry by the District Court as to whether the Department "recognizes the Greek Government's claim of sovereign immunity . . . ," the Department explained that its earlier note was intended to leave open that question "for judicial determination." *Id.*, p. 55.

In the following cases where the State Department expressly recognized immunity from suit and an appropriate Suggestion was filed in the proceeding at the direction of the Attorney General, the Suggestion was recognized as binding and was followed by the court. *Ex parte* Peru, 318 U.S. 578 (1943); Rich v. Naviera Vacuba S.A., 295 F.2d 24 (4th Cir. 1961); Isbrandtsen Co. v. Netherlands East Indies Government, 75 F. Supp. 48 (S.D.N.Y. 1947); Piascik v. British Ministry of War Transport, 54 F. Supp. 487 (S.D.N.Y. 1943); The Tassia, 41 F. Supp. 699 (S.D.N.Y. 1941); The Maliakos, 41 F. Supp. 697 (S.D.N.Y. 1941); Knocklong Corp. v. Afghanistan, 6 Misc. 2d 700, 167 N.Y.S. 2d 285 (Nassau County Ct. 1957); see Hassard v. Mexico, 46 App. Div. 623, 61 N.Y.Supp. 939 (1899), *aff'd*, 173 N.Y. 645, 66 N.E. 1110 (1903).

In the following cases the opinions expressly recognize that a Suggestion of Immunity filed by the Executive is conclusive and binding upon the courts. Mexico v. Hoffman, 324 U.S. 30, 34-35 (1945); Compania Espanola v. The Navemar, 303 U.S. 68, 74 (1938); United States v. Lee, 106 U.S. 196, 209 (1882); Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 981, n. 6 (D.C. Cir. 1965); Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana, 335 F.2d 619, 623 (4th Cir. 1964); Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 976-77 (S.D.N.Y. 1965); United States v. Anchor Line, Ltd., 232 F. Supp. 379, 385 (S.D. N.Y. 1964); New York & Cuba Mail S.S. Co. v. Korea, 132 F. Supp.

the Department merely transmits the foreign government's claim of immunity to the court as a matter of courtesy or "comity,"[6] or where the Department's com-

684, 686 (S.D.N.Y. 1955); The Janko, 54 F. Supp. 240, 241 (E.D. N.Y. 1944); Florida *ex rel.* Nat'l Institute of Agrarian Reform v. Dekle, 137 So. 2d 581, 583 (Fla. Dist. Ct. App. 1962); Miller v. Ferrocarrill del Pacifico de Nicaragua, 137 Me. 251, 257, 18 A.2d 688, 691 (1941); Mexico v. Schmuck, 294 N.Y. 265, 270, 272, 62 N.E.2d 64, 66, 68 (1945); Lamont v. Travelers Ins. Co., 281 N.Y. 362, 373, 24 N.E.2d 81, 86 (1939); Fields v. Predionica I. Tkanica A.D., 263 App. Div. 155, 159, 31 N.Y.S.2d 739, 743 (1941); Ulen & Co. v. Bank Gospodarstwa Krajowego, 261 App. Div. 1, 4, 24 N.Y.S.2d 201, 204 (1940); Three Stars Trading Co. v. Cuba, 32 Misc. 2d 4, 5, 222 N.Y.S.2d 675, 677 (Sup. Ct. 1961); Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 301, 204 N.Y.S.2d 971, 974 (Sup. Ct. 1960), *aff'd*, 17 App. Div. 2d 927, 233 N.Y.S.2d 1013 (1962); Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 1087, 192 N.Y.S.2d 469, 472, 473 (Sup. Ct. 1959).

[6] *E.g.*, The Katingo Hadjipatera, *supra* note 5; The Attualita, 238 Fed. 909 (4th Cir. 1916); Lamont v. Travelers Ins. Co., *supra* note 5; Ulen & Co. v. Bank Gospodarstwa Krajowego, *supra* note 5; Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825 (1940).

In *Ex parte* Muir, 254 U.S. 522 (1921), this Court ruled that unless a Suggestion of Immunity is made by the State Department immunity must be claimed by the foreign government's accredited diplomatic representative. Hence the Department's transmittal of the claim to the court without a Suggestion of Immunity is of practical assistance to the foreign government, for its makes intervention by the Ambassador unnecessary. Where the Ambassador or other representative of the foreign state claims immunity by directly participating in the proceeding, either as intervenor or as *amicus curiae*, he frequently obtains from the State Department a certificate that he is the accredited diplomatic representative of the foreign government. *E.g.*, The Carlo Poma, 259 Fed. 369 (2d Cir. 1919), *vacated*, 255 U.S. 219 (1921); The Secundus, 15 F.2d 711 (E.D.N.Y. 1926); The Rogdai, 278 Fed. 294 (N.D. Cal. 1920); The Maipo, 252 Fed. 627 (S.D.N.Y. 1918). Such a certificate by the Department of course gives "no sanction to the suggestion" made by the Ambassador directly to the court. The Pesaro, 255 U.S. 216, 219 (1921).

munication "accepts as true" certain allegations of the foreign government but declines to suggest immunity,[7] or where the Department does not unequivocally recognize and allow immunity from suit, but suggests that the foreign sovereign's property will be immune from execution even if a judgment is rendered against the sovereign.[8] Nor is this a case where the communication though cast in the form of a Suggestion of Immunity really seeks to assert that the foreign government has the right to specific property in the custody of the court,[9] or seeks to prevent disposition of the proceeds of an already consummated judicial sale.[10]

The reason for giving such effect to an Executive Suggestion is founded in the President's constitutional responsibility for the foreign relations of the United States. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). As this Court observed long ago, attempted suits in our courts against foreign

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[7] *E.g.*, Mexico v. Hoffman, *supra* note 5; Sullivan v. State of Sao Paulo, 122 F.2d 355 (2d Cir. 1941); see The Johnson Lighterage Co. No. 24, 231 Fed. 365 (D.N.J. 1916); The Luigi, 230 Fed. 493 (E.D. Pa. 1916). See also The Ioannis P. Goulandris, 40 F. Supp. 924 (S.D.N.Y. 1941); Miller v. Ferrocarrill del Pacifico de Nicaragua, *supra* note 5, nevertheless dismissing the suit on the strength of such a communication.

[8] See, *e.g.*, New York & Cuba Mail S.S. Co. v. Korea, *supra* note 5; Mexico v. Schmuck, *supra* note 5; Weilamann v. Chase Manhattan Bank, *supra* note 5.

[9] Stephen v. Zivnostenska Banka, Nat'l Corp., 15 App. Div. 2d 111, 222 N.Y.S. 2d 128 (1961), *aff'd mem.*, 12 N.Y.2d 781, 186 N.E.2d 676 (1962); Frazier v. Hanover Bank, 204 Misc. 922, 119 N.Y.S.2d 319 (Sup. Ct. 1953), *aff'd mem.*, 281 App. Div. 861, 119 N.Y.S.2d 918 (1953).

[10] United States v. Harris & Co. Advertising, Inc., 149 So.2d 384 (Fla. Dist. Ct. App. 1963). Compare Florida *ex rel.* Nat'l Institute of Agrarian Reform v. Dekle, *supra* note 5.

sovereigns raise questions of foreign relations; hence "the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *United States* v. *Lee,* 106 U.S. 196, 209 (1882). Thus this Court specifically held in *Ex parte Peru,* 318 U.S. 578, 588 (1943), that judicial action against a friendly foreign sovereign "is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination" of immunity. *Accord, Mexico* v. *Hoffman,* 324 U.S. 30, 34-35 (1945; *Compania Espanola* v. *The Navemar,* 303 U.S. 68, 74 (1938). This constitutional basis for treating the Executive's determination as conclusive recently has been expressly reaffirmed. *Rich* v. *Naviera Vacuba S.A.,* 295 F. 2d 24, 26 (4th Cir. 1961), *applications for stay denied by the Chief Justice,* U.S. Sup. Ct., Sept. 11, 12, 14, 1961; *Banco Nacional de Cuba* v. *Farr,* 243 F. Supp. 957, 976-77 (S.D.N.Y. 1965).

6. The Petition seems to argue that, if a complaint in court alleges a violation of international law by the foreign sovereign, the Executive's determination is not entitled to the traditional deference by the Judiciary. But it is precisely in such a case that issues of foreign relations are likely to be most delicate and a court of common pleas least appropriate to their resolution. *Cf. Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 422-23, 430-33 (1964).

7. The procedure of presenting the Executive's Suggestion of Immunity through the United States Attorney, followed here, is a century and a half old. See

The Schooner Exchange v. *McFaddon,* 7 Cranch 116, 147 (1812); *Ketland* v. *The Cassius,* 2 Dall. 365 (C.C.D. Pa. 1795). It has been expressly approved by this Court as the way to present a binding Suggestion. *Ex parte Peru,* 318 U.S. 578 (1943). The very words to be used by the Executive when it intends a binding Suggestion ("recognizes and allows the soverign immunity," the language used by the Executive in this case, R. 52a) were formulated by this Court. *Compania Espanola* v. *The Navemar,* 303 U.S. 68, 74 (1938).

8. Petitioners' attempt to find support in this Court's *dicta* in *National City Bank* v. *China,* 348 U.S 356 (1955), is in vain. There this Court relied on *Ex parte Peru, supra,* in reaffirming the view that, "as the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit." 348 U.S. at 360. And there, in allowing trial, not of a complaint, but of a counterclaim against a foreign sovereign that had already submitted itself to a court in the United States by filing a complaint, this Court relied on the fact that "our State Department neither has been asked nor has it given the slightest intimation that in its judgment allowance of counterclaims in such a situation would embarrass friendly relations with the Republic of China." 348 U.S. at 364.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HOWARD C. WESTWOOD
WILLIAM A. DOBROVIR
GEORGE V. ALLEN, JR.
701 Union Trust Building
Washington, D. C. 20005

THOMAS F. MOUNT
1910 Packard Building
Philadelphia, Pa. 19102

Attorneys for Respondent

COVINGTON & BURLING
RAWLE & HENDERSON
Of Counsel